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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

SAMUEL B. JOHNSON,

Petitioner,

VERSUS

STATE OF MISSISSIPPI,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

==========

BRIEF IN OPPOSITION

==========

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QUESTIONS PRESENTED

1. Under The Mississippi Death Sentencing Scheme The Interpretation Of Aggravating Circumstances Is A Matter Of State Law As The Constitutionally Required Narrowing Is Accomplished In The Definition Of the Crimes Which Are Eligible For The Death Penalty. Further Where Three Aggravating Circumstances Supporting the Sentence Of Death Are Found To Exist Beyond A Reasonable Doubt By The Jury The Subsequent Invalidation Of One Of Those Factors Does Not Require The Vacation Of The Sentence Of Death, Therefore Certiorari Should Be Denied.

2. Where The Refusal To Vacate The Death Sentence Of Petitioner Does Not Rest On Whether Full Faith And Credit Is Given To The Judgment Of The New York Court Of Appeals There Is No Federal Question And Certiorari Should Be Denied.

3. The Interpretation Placed On The Aggravating Circumstance Of "Especially Heinous, Atrocious Or Cruel" Is A Matter Of State Law And Therefore Not Cognizable By This Court On Certiorari, Therefore Certiorari Should Be Denied.

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NO. 85-6325

IN THE SUPREME COURT OF THE UNITED STATES
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SAMUEL B. JOHNSON,
Petitioner,

VERSUS

STATE OF MISSISSIPPI,
Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

==========

BRIEF IN OPPOSITION

==========

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of the State of Mississippi is reported as Johnson v. State, 511 So.2d 1333 (Miss. 1987). A copy of the opinion is before the Court as an Exhibit to petitioner's Petition for Writ of Certiorari to the Supreme Court of Mississippi.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 1257 (3). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner claims that the provisions of the Constitution of the United States, Article IV, section 1; Amendments VIII, and XIV are involved in this petition. He also claims that 28 U.S.C. § 1738 (1982), as well as Miss. Code Ann. §99-19-101 (Supp. 1986) are involved.

STATEMENT OF THE CASE

Petitioner appears before this Court as a result of the denial of post-conviction relief by the Mississippi Supreme Court. The conviction and resulting death sentence he is challenging were returned in the Circuit Court of Pike County, Mississippi. The Pike County trial was conducted pursuant to an indictment returned by the grand jury of Covington County, Mississippi for the capital murder of Highway Patrolman Billy Langham in the course of his duty as a peace officer. Miss. Code Ann. § 97-3-19 (2) (a). Venue was changed to Pike County, Mississippi on motion of petitioner. Petitioner's bifurcated trial was conducted pursuant to Miss. Code Ann. § 99-19-101 et seq. At the conclusion of the sentencing phase of the trial the jury returned a sentencing verdict of death, finding three aggravating circumstances and holding that they outweighed any mitigating circumstances. These aggravating circumstances were:

> (1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use of threat of violence to the person.
>
> (2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.
>
> (3) The capital murder was especially heinous, atrocious and cruel.
>
> Tr. 2294; 511 So.2d at 1337.

On automatic direct appeal to the court below petitioner raised twenty-two separate claims of error. After briefing and argument, on May 8, 1985 the Mississippi Supreme Court affirmed, by written opinion, petitioner's conviction and death sentence. A petition for rehearing was denied on November 6, 1985. Johnson v. State, 477 So.2d 196 (Miss. 1985). Petitioner then filed a petition for writ of certiorari with this Court. After consideration this

petition was denied. Johnson v. Mississippi, ___U.S. ___, 106 S.Ct. 1958 (1986). A petition for rehearing was filed and denied in due course. Johnson v. Mississippi, ___ U.S. ___, 106 S.Ct. 2930 (1986).

The facts giving rise to petitioner's conviction and sentence of death show that on December 31, 1981, petitioner, Samuel Johnson, Charles Montgomery, Otis Lee Fairley and Anthony Fields left New Orleans, Louisiana headed for Collins, Mississippi. They were traveling in Johnson's yellow Ford LTD automobile. They stopped briefly to visit some of Fairley's relatives in Purvis, Mississippi. When they were approaching Collins they were stopped by Mississippi Highway Patrolman Billy Langham. Langham asked Johnson to produce a driver's license. Johnson had none. Langham then asked Johnson to get out of the car. Johnson complied. When Johnson got out of the car Langham saw a butcher knife on the front seat next to the spot where Johnson had been sitting. He asked Johnson to move to the rear of the car. Langham then placed the butcher knife on top of his patrol car. He went back to the LTD and told the rest of the occupants of the car he was going to search them. He did so one-by-one sending them to stand near the patrol car as he finished searching each one. He then proceeded to search the LTD.

While he was searching the car Fairley walked to the patrol car, got the butcher knife and gave it to Johnson. Johnson slowly walked back to his car and stabbed Langham in the back as he was searching the back seat of the LTD.

Langham went for his gun. Johnson also went for Langham's gun. They struggled. Johnson called to Fairley for assistance when Langham proved to be to much for him to handle. Johnson and Fairley then struggled with Langham. Johnson then told Montgomery to get Langham's gun.

Montgomery joined the afray and got the gum. When Montgomery secured the gun he yelled to the others that he had the gun. Johnson and Fairley broke free of Langham and went for the car. Montgomery held the gun on Langham. Montgomery started to get in the car and Johnson said "No, shoot the motherfucker." Montgomery hesitated and Johnson told him again to shoot. Montgomery advanced on Langham as he begged him not to shoot. Montgomery shot and killed Langham. He then got in the car and threw the gun out as they sped away.

The four men abandoned the yellow LTD a short time later and obtained a yellow Mercury Comet. They were finally stopped by shooting out the tires of the car when they attempted to run through a police roadblock.

REASONS FOR DENYING THE WRIT

Petitioner has presented no Federal question that is cognizable by this Court therefore the petition for writ of certiorari should be denied.

ARGUMENT

1. **Under The Mississippi Death Sentencing Scheme The Interpretation Of Aggravating Circumstances Is A Matter Of State Law As The Constitutionally Required Narrowing Is Accomplished In The Definition Of the Crimes Which Are Eligible For The Death Penalty. Further Where Three Aggravating Circumstances Supporting the Sentence Of Death Are Found To Exist Beyond A Reasonable Doubt By The Jury The Subsequent Invalidation Of One Of Those Factors Does Not Require The Vacation Of The Sentence Of Death, Therefore Certiorari Should Be Denied.**

We begin by pointing out that Evans' claim under this question presented does not involve a federal question. The interpretation and application of aggravating circumstances under the Mississippi statutory scheme for imposition of the death penalty is a matter of state law not cognizable by the federal courts. In addressing a similar question concerning the application of aggravating circumstances under the

Mississippi capital sentencing scheme in Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987), pet. reh. denied, ___ U.S. ___, 107 S.Ct. 2207, 95 L.Ed.2d 861 (1987), the Fifth Circuit held:

> No such failure exists in the present case. Even given Mississippi's broadened construction of the especially heinous aggravating circumstance, and ignoring the other aggravating circumstance found by the jury,[3] the Mississippi capital murder statute still narrows the class of persons eligible for the death penalty. In the present case, for example, Johnson was convicted of the murder of a peace officer acting in his official capacity. This element of a capital offense in Mississippi is a statutory aggravating circumstance in Georgia. Ga. Code §27-2534.1(b)(8), quoted in Godfrey, 446 U.S. at 423 n. 2, 100 S.Ct. at 1762 n.2. The definition of capital murder in Mississippi serves the same narrowing function as the parallel aggravating circumstance would in Georgia.
>
> In fact, the Mississippi death penalty statute, as applied in this case, is indistinguishable from the Texas statute. In approving the Texas statute in Jurek, the Supreme Court recognized that, by defining capital murder narrowly, "in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed." 428 U.S. at 270, 96 S.Ct. at 2955. As this court stated in Welcome v. Blackburn, 793 F.2d 672, 677 (5th Cir. 1986)
>
> > By classifying first degree murder as including certain aggravating circumstances the state has narrowed the class of those subject to the death penalty as effectively as if it allowed a broader class to be convicted but then limited those within the broader class who could be sentenced to death to only persons whose crimes are accompanied by specific aggravating circumstances.

The Mississippi statute, unlike the Texas statute, provides the added protection of requiring proportionality review by the state supreme court. Compare Miss. Code Ann. § 99-19-105(3)(c) (Supp. 1985) with Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 878, 79 L.Ed.2d29 (1984). See Barclay v. Florida, 463 U.S. 939, 958, 103 S.Ct. 3418, 3429, 77 L.Ed.2d 1134 (1983) (plurality opinion); Stephens, 462 U.S. at 879-80, 103 S.Ct. at 2743. Thus, the Mississippi death penalty statute satisfies constitutional requirement despite the broad construction placed on the especially heinous aggravating circumstance by the Mississippi Supreme Court.[4]

> We do not base this decision on the harmless error doctrine of Stephens, 462 U.s. at 884-91, 103 S.Ct. at 2746-50. See Barclay, 463 U.S. at 951 n.8, 103 S.Ct. at 3425 n. 8. Mississippi's choice to apply a broadened construction to the especially heinous aggravating circumstance is not constitutional error. If the change in construction is an error at all, it is an error of state law that is not cognizable on habeas review. Harris, 104 S.Ct. at 875; Barclay, 463 U.S. at 957-58, 103 S.Ct. at 3428-29. [Footnotes omitted.]
>
> 806 F.2d at 1248-49.

As the Fifth Circuit recognized in Johnson v. Thigpen, Mississippi has adopted a scheme for imposition of the death penalty that has a somewhat unique double narrowing feature. Because of the narrow definition of capital murder in Mississippi the statutory aggravating circumstances in the Mississippi scheme do not take on the same constitutional significance they would in other schemes, such as Georgia's, where everyone convicted of first degree murder is eligible for the death penalty upon the finding of an aggravating circumstance. Under the Mississippi scheme unless the crime fits under one of the narrow definitions of capital murder found in Section 97-3-19 (2), Miss. Code Ann. (Supp. 1986), one cannot even be charged with capital murder. There being no federal question presented here, certiorari should be denied. However, out of an abundance of caution, we will briefly speak to the challenge to the aggravating circumstance found in this case.

When the jury in petitioner's case returned the sentence of death in 1982 they found the existence of three aggravating circumstances to support that sentence. These aggravating circumstances, as set forth in the sentence of the jury, were:

> (1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use of threat of violence to the person.

> (2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.
>
> (3) The capital murder was especially heinous, atrocious and cruel.
>
> Tr. 2294; 511 So.2d at 1337.

The basis for finding the first aggravating factor was a 1963 conviction from the State of New York for assault second degree with intent to commit rape, first degree. Petitioner made two challenges to this finding by the jury on direct appeal, first, that it did not channel the jury's discretion by "clear and objective standards," and second, the conviction was too remote in time. Both arguments were rejected by the Mississippi Supreme Court. 477 So.2d at 218-219; 511 So.2d at 1336. Only after affirmance of the conviction and sentence by the Mississippi Supreme Court and denial of certiorari by this Court was any question raised in any court concerning the validity of the 1963 New York conviction.

Petitioner filed the challenge to the 1963 New York assault conviction at approximately the same time his post-conviction petition was filed against the Mississippi capital conviction and sentence in 1986. Initially the Monroe County Court and the Supreme Court of New York denied relief to petitioner. People v. Johnson, 509 N.Y.S.2d 789 (A.D. 4 Dept. 1986). However, on appeal from this denial of relief the New York Court of Appeals granted the relief requested. People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177 (N.Y. 1987). This decision was forwarded, by petitioner, to the Mississippi Supreme Court for its consideration in connection with the pending Mississippi post-conviction petition.

The court below first discussed the limited nature of post-conviction review in Mississippi both under the post-conviction review statute and prior court precedent.

511 So.2d at 1336. Then Mississippi Supreme Court spoke to the issue of the first aggravating circumstance on three alternative grounds stating:

> It is apparent that Johnson waived this claim, and it is procedurally barred. At no time during his direct appeal, or in his petition for certiorari to the United States Supreme Court did he argue his New York conviction was constitutionally invalid. Moreover, there is nothing to suggest he took any steps to vacate this conviction until he filed this petition. On appeal Johnson's counsel alleged thirteen assignments of error, and at Johnson's own urging, his counsel added seven additional assignments. None questioned the validity of his New York conviction. See Evans v. State, 485 So.2d 276 (Miss. 1986), at 280-281.
>
> Also, the jury found three aggravating circumstances to support its verdict. Even if we conceded that the jury had no authority to consider this conviction, the remaining two aggravating circumstances were sufficient to support the jury's verdict. Zant v. Stephens, 462 U.S. 862, 880-884, 103 S.Ct. 2733, 2744-2746, 77 L.Ed.2d 235, 252-254 (1983); Irving v. State, 498 So.2d 305, 314 (Miss. 1986).
>
> Aside from the statutory limitation of review, we remain unpersuaded by this contention.
>
> We have never faced this question. A somewhat similar question has been before un concerning the use of a prior criminal conviction to impeach a defendant in a criminal trial. We have held that subsequent reversal on appeal of a prior conviction did not affect a defendant's trial conviction. Young v. State 425 So.2d 1022 (Miss. 1983); Milstid v. State, 347 So.2d 1319 (Miss. 1977); and Nicholson v. State, 254 So.2d 881 (Miss. 1971).
>
> Also, in Phillips v. State, 421 So.2d 476 (Miss. 1982), the state used a Kentucky conviction as a basis for Phillips' conviction under one of Mississippi's habitual criminal statutes. Miss. Code. Ann. § 99-19-81 (Supp. 1984). We held that when the conviction was subsequently reversed, it could constitute a basis for post-conviction relief from the habitual criminal conviction.
>
> Under Miss. Code Ann. § 99-19-81, however, upon proof of the prior conviction a circuit judge has no alternative except to sentence to the maximum authorized by law. Such a sentence cannot be suspended and the accused will never be eligible for parole or probation prior to serving this maximum sentence. In the sentencing phase of a capital murder trial the jury is not required to sentence the defendant to death, regardless of its finding.

> When a prior conviction is used under either habitual offender statute, it is, of course, certain that the defendant will receive greater punishment. The admission of a prior conviction in order to impeach the accused as a witness, or at a sentencing phase of a capital murder trial may or may not materially influence the jury.
>
> As we noted, the jury found three aggravating circumstances existed, and of the three we have little doubt that in a rational sentencing process Zant v. Stephens, supra, the other two aggravating circumstances would carry greater weight than the New York conviction in determining Johnson's sentence. Indeed, the remoteness in time at the time of the prior conviction was a mitigating circumstance. Johnson v. State, 477 So.2d at 219.

[emphasis added.] 511 So.2d 1337-38.

The above language makes it clear that the Mississippi Supreme Court first invoked the state procedural bar in deciding that the issue of the validity of the 1963 conviction was not properly before it. As stated earlier, post-conviction review is limited in Mississippi. The provisions of the post-conviction review statute were invoked by the court when it quoted the provisions of Section 99-39-21, Miss. Code Ann. (Supp. 1984), reads in part:

> (1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.
>
> . . .
>
> (4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.
>
> (5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.

[Emphasis the Court's.] 511 So.2d at 1336.

Petitioner did not raise a claim on the basis of the invalidity of the New York conviction at trial or on direct appeal therefore he was procedurally barred from raising such a claim on state post-conviction review unless he could show cause and actual prejudice. Petitioner did not, and we submit could not, show the required "cause" under state law because the legal foundation upon which the claim for relief was based could have been discovered with reasonable diligence at the time of trial or direct appeal. The New York conviction was at least twenty years old at the time of the trial. The legal theory upon which the New York conviction was reversed was available to petitioner at all times during those twenty years. Therefore the claim was properly procedurally barred as petitioner could not show cause. Nor could petitioner overcome the hurdle of actual prejudice. The Mississippi Supreme Court found that even if the issue had not been procedurally barred, the the jury found two other aggravating circumstances that "would carry greater weight than the New York conviction in determining Johnson's sentence." 511 So.2d at 1338. Therefore under state procedural law petitioner was barred from raising this claim and therefore is so barred here. In Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985), this Court stated "[i]f the state court decision indicates clearly and expressly that it is alternatively based on a bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." 472 U.S. at 327. The Mississippi Supreme Court clearly and expressly stated that the issue was first procedurally barred from review, then it made alternative rulings. Therefore even if this proposition was cognizable by the federal courts it would be barred for failure to follow proper state procedural rules.

The second alternative ruling was made under the rational of Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), holding that the subsequent invalidation of one aggravating circumstance, when others exist, does not require the vacation of a death sentence. The court below considered the vacation of the New York conviction and found that the invalidity of the aggravating circumstance based upon the conviction was not sufficient to require the vacation of the death sentence. This is settled law. Rault v. Butler, 826 F.2d 299 (5th Cir. 1987), cert. denied, ____ U.S. ____, 108 S.Ct. 14 (1987); Celestine v. Butler, 823 F.21d 74 (5th Cir. 1987), cert. denied, ____ U.S. ___, 108 S.Ct. 6 (1987); Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987), cert. denied, ___ U.S. ___, 107 S.Ct. 3278, 97 L.E.d 2d 782 (1987); Watson v. Blackburn, 756 F.2d 1055, 1058 (5th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 2259, 93 L.E.d 2d 703 (1986); Knighton v. Maggio, 740 F.2d 1344,1351-52 (5th Cir. 1984), cert. denied, ___ U.S.___, 105 S.Ct. 306, 83 L.Ed.2d 241 (1984); Moore v. Maggio, 740 F.2d 308, 321 (5th Cir. 1984), cert. denied, 472 U.S. 1032, 105 S.Ct. 3524, 87 L.Ed.2d 643 (1985); Williams v. Maggio, 679 F.2d 381, 388-90 (5th Cir. 1982)(en banc), aff'd, 464 U.s. 46, 104 S.Ct. 311, 78 L.Ed.2d 43 (1983). Again if this issue were proper for federal review it would be without merit.

Finally the Mississippi Supreme Court considered tne question of whether the vacation of a conviction by a foreign state in a subsequent post-conviction proceeding actually invalidated the aggravating circumstance in Mississippi. The court held that in that situation the vacation of the conviction would not necessarily invalidate the aggravating circumstance in Mississippi. The interpretation of aggravating circumstances is purely a

matter of state law and therefore no constitutional violation is present here. Johnson, supra.

Even if the issue were cognizable by this Court, it is clear that the Mississippi court's decision rested first a state procedural bar and second on the ground that the failure of one of several aggravating factors did not vitiate the sentence. Since the court below expressly decided the issue on a alternate separate and independent state law grounds, even if this Court had jurisdiction to entertain the question it would fail. Since the interpretation of aggravating circumstances under the Mississippi death sentencing scheme is a matter of state law certiorari should be denied.

2. Where The Refusal To Vacate The Death Sentence Of Petitioner Does Not Rest On Whether Full Faith And Credit Is Given To The Judgment Of The New York Court Of Appeals There Is No Federal Question And Certiorari Should Be Denied.

Petitioner next contends that the Mississippi Supreme Court has failed to give the judgment of the New York Court of Appeals vacating his 1963 conviction for assault with intent to rape full faith and credit. The State of New York has filed an amicus in support of this position. Our response is simply that the court below in no way failed to give the judgment of the New York court full faith and credit. The Mississippi Court stated:

> The New York courts are, of course, the final and proper arbiters of all judicial proceedings in that state, including the disposition of post-conviction petitions. Assuredly, by our view, we suggest no impropriety in the courts of that state taking whatever action they deem appropriate in a criminal case in New York.

511 So.2d at 1339.

The court below did not in any way state that they were not recognizing that the conviction had been vacated. The Mississippi court simply stated that under the circumstances

of this case the vacation of the 1963 conviction by the New York Court of Appeals would not require the vacation of the death penalty verdict returned in Mississippi. Simply stated it did not matter that this New York conviction was vacated, two additional aggravating circumstances were present and all that is required to sustain a death penalty is one valid aggravating circumstance. Zant v. Stephens, supra, Knighton v. Maggio, supra, Moore v. Maggio, supra.

For the purposes of this argument it matters not whether the Mississippi Supreme Court extended full faith and credit to the judgment of the New York court. Even if the Mississippi Supreme Court had stated in the opinion that they disagreeded with the vacation of the 1963 conviction, which they did not, it would not have changed the outcome of the decision of the court below. The Mississippi court recognized that the conviction had been vacated but, held that it was not sufficient to change the outcome of the trial in which petitioner was sentenced to death. This is not a refusal to grant full faith and credit to the New York judgment, it is only an interpretation of the effect of such a reversal on a death sentence in Mississippi. Since no federal right has been violated certiorari should be denied.

3. The Interpretation Placed On The Aggravating Circumstance Of "Especially Heinous, Atrocious Or Cruel" Is A Matter Of State Law And Therefore Not Cognizable By This Court On Certiorari, Therefore Certiorari Should Be Denied.

This issue is not properly before this Court. The Court below held that this issue involving the "espically heinous, atrocious or cruel" aggravating circumstance was res judicata as it had been raised and decided on direct appeal and could not be raised again in a post-conviction petition. 511 So.2d at 1342. Therefore the state court

expressly imposed a procedural bar to the consideration of this issue below. An adequate and independant state law ground exist upon which this issue has been decided in this context. Caldwell, supra. The time and place for petitioner to present this issue to this Court would have been in his petition for writ of certiorari from the direct appeal filed in 1985 not from denial of this post-conviction petition. This is not a case of having different counsel at the two proceedings. One of the attorney's presently representing petitioner was representing him when the petition for certiorari was filed from the direct appeal. The choice was made at that time not to raise this issue before this Court. It cannot be done now, some twenty months after the time for filing a petition for certiorari from the direct appeal has passed. It seems we have petitioner attempting relitigate an issue that was properly a issue in the certiorari from direct appeal, but not from this post-conviction petition. On this ground alone certiorari should be denied.

Otherwise the issue is controlled by the decision of the Fifth Circuit in Johnson v. Thigpen, supra. Petitioner knows of the decision in Johnson, as he cites to it in footnote 15 of his petition. However he strangely states that "the Fifth Circuit held that the 'especially heinous, atrocious or cruel' aggravating circumstance was unconstitutionally vague as applied in Mississippi". Petition at 26. Suffice it to say that petitioner had better read Johnson v. Thigpen again, for his interpretation is severely flawed or he is deliberately attempting to mislead this Court. As stated above in response to the first question, the Fifth Circuit held that the interpretation placed on aggravating circumstance by the Mississippi Supreme Court was a matter of state law as the narrowing required by the constitution is performed by the

definition of capital murder in Mississippi. 806 F.2d at 1247-49. In fact the Fifth Circuit stated "Mississippi's choice to apply a broadened construction to the especially heinous aggravating circumstance is not constitutional error." 806 F.2d at 1249.

Even if this court somehow be found error in this aggravating circumstance, petitioner still has the problem of the existence of a third aggravating factor. The jury also found beyond a reasonable doubt that the petitioner "committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody." R. 2263-64. That leaves a valid aggravating circumstance upon which the death penalty can rest. Therefore petitioner gets no relief from the sentence of death.

The evidence shows that petitioner set in motion the events that ended in Patrolman Billy Langhams death by taking a butcher knife and stabbing the officer in the back. A struggle insued during which the officers gun was taken from him. These tragic events concluded with petitioner ordering one of his cohorts to shoot the officer with his service revolver as the Langham begged for his life. These facts clearly show that the crime was especially heinous, atrocious or cruel.

The interpretation of this aggravating circumstance being a matter of state law, certiorari should be denied.

CONCLUSION

For the above and foregoing reasons respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the following:

Clive A. Stafford Smith
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and

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This, the 16th day of November, 1987.

Marvin L. White, Jr.
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